DECISION **2017 NSUARB 4**
M07610

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF a Preliminary motion respecting the mootness of an Appeal by **ASHCROFT HOMES INC.** from the decision of the Development Officer, who refused to issue a development permit for a proposed student residence at 5900 Inglis Street, Halifax, Nova Scotia

BEFORE:	Roland A. Deveau, Q.C., Vice Chair Roberta J. Clarke, Q.C., Member Richard J. Melanson, LL.B., Member
APPELLANT:	**ASHCROFT HOMES INC.** Nancy G. Rubin, Q.C.
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B.
INTERVENORS:	**SAINT MARY'S UNIVERSITY** Kevin Latimer, Q.C. Jack K. Townsend, LL.B. **PARK TO PARK COMMUNITY ASSOCIATION** Michael P. Scott, LL.B.
SUBMISSIONS COMPLETED:	December 21, 2016
DECISION DATE:	**January 16, 2017**
DECISION:	**The Board grants the Preliminary motion. The Appeal is dismissed as being moot.**

Document: 251525

I INTRODUCTION

[1] This is a Decision of the Nova Scotia Utility and Review Board ("Board") respecting a Preliminary motion claiming as "moot" an appeal by Ashcroft Homes Inc. ("Ashcroft" or "Appellant"). The Appeal is from the decision of a Development Officer for Halifax Regional Municipality ("HRM"), who refused to issue a development permit for a proposed university student residence having two towers of 28 and 31 storeys, with accessory uses, at 5900 Inglis Street, Halifax, Nova Scotia.

[2] The Ashcroft appeal was made under s. 262(3) of the *Halifax Regional Municipality Charter,* S.N.S. 2008, c. 39, as amended ("*HRM Charter*"). The central issue in the appeal was whether the Development Officer's decision complied with the land use by-law.

[3] Following a preliminary hearing, the Board issued a Decision on September 19, 2016 [2016 NSUARB 166], granting formal standing to the following intervenors: Saint Thomas Aquinas-Canadian Martyrs Parish ("Parish"); the Roman Catholic Episcopal Corporation of Halifax ("RCEC"); St. Mary's University ("SMU" or "University"); and Park to Park Community Association ("Park to Park"). In advance of the hearing on the merits, the Parish and RCEC both withdrew from further involvement in the appeal.

[4] The hearing on the merits was held on October 25 to 27 and November 1, 2016, at the Board's Offices, in Halifax, Nova Scotia. During the course of written closing submissions following the hearing on the merits, circumstances arose which caused Park to Park, SMU and HRM to allege that the appeal had become moot.

[5] The original request to dismiss the appeal as being moot was made by Park to Park on November 25, 2016. The request was supported by counsel for HRM and SMU in letters dated November 28, 2016.

[6] The Board requested further written submissions on the mootness issue, which were received from counsel for Ashcroft on December 14, 2016, with reply submissions from counsel for HRM and Park to Park on December 20, 2016, and from counsel for SMU on December 21, 2016.

[7] The subject property is located on the southern side of Inglis Street in the south end of the Halifax peninsula. The 1.21 acre property is owned by RCEC and is the location of Canadian Martyrs Church ("Church"). The University owns the land to the west, south and east of the subject property. The SMU campus effectively surrounds the Church property.

[8] By way of background, the parishes of Canadian Martyrs and Saint Thomas Aquinas, on Oxford Street, amalgamated in 2008. The Parish decided to sell the Canadian Martyrs property and to use the proceeds to modernize and upgrade Saint Thomas Aquinas Church, and to build a new parish centre. Ashcroft was the successful bidder in an RFP process to purchase the Church property, which received substantial interest from developers. The sale was subject to approval by the Vatican, which was received on October 4th and filed as an exhibit in this matter on October 21, 2016.

[9] Ashcroft proposed to develop "residential accommodation for university students" (a term used in the land use by-law) comprised of a building with two towers of 28 and 31 storeys, including a three-storey podium at ground level.

[10] Ashcroft applied to HRM for a development permit on April 14, 2016. Following numerous requests by the Appellant asking for a determination by the Development Officer, an oral decision denying the permit was communicated on August 9, 2016.

[11] Ashcroft filed an appeal with the Board on August 11, 2016. On August 29, 2016, a written refusal letter was issued by HRM's Chief Planner and Director of Planning and Development, in his recently appointed role as a development officer.

[12] The closing of the transaction between Ashcroft and RCEC was contemplated to take place on October 31, 2016. The sale was not completed because no development permit had been issued, and RCEC terminated the agreement of purchase and sale.

[13] RCEC relisted the Church property for sale by advertisement in The Chronicle Herald on November 16, 2016. While Ashcroft made a new offer to purchase the property on November 30, 2016, it was SMU which ultimately submitted the successful bid accepted by RCEC.

II LAW – SCOPE OF APPEAL

[14] The appeal by Ashcroft was made under s. 262(3) of the *HRM Charter*, which provides:

> **262 (3)** The refusal by a development officer to
>
> (a) issue a development permit; or
> (b) approve a tentative or final plan of subdivision or a concept plan,
>
> may be appealed by the applicant to the Board.

[15] The scope of the appeal is set out in s. 265(2):

> **265 (2)** An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-

> law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area. [Emphasis added]

[16] The Board's remedial powers in this type of appeal are addressed in s. 267(1)(a) and (d):

> **267 (1)** The Board may
> (a) confirm the decision appealed from;
> ...
> (d) allow the appeal and order that the development permit be granted;

[17] The standard of review which applies to the Board's consideration of the appeal on the merits is based on the correctness standard: see *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78 (CanLII). In applying this standard, the Board "should interpret the LUB not formalistically, but pragmatically and purposively, to make the LUB work as a whole"; see *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 (CanLII), para. 29 and *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90 (CanLII), para. 43.

III LAW – MOOTNESS

[18] All counsel agree that the leading authority on the mootness issue is the judgement of the Supreme Court of Canada in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342.

[19] In *Borowski,* Sopinka, J., set out the applicable test as follows:

> Mootness
>
> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly

if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. ...

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

When is an Appeal Moot? -- The Authorities

The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, ...

...

The Exercise of Discretion: Relevant Criteria

Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. ...I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. ...

...

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. ... It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the

parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. ...

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in International *Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. ... The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. ...
...

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. ...

In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada
...
...

...In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa. [Emphasis added]

[pp. 353-363]

IV ANALYSIS AND FINDINGS

[20] Pursuant to *Borowski*, the first step in the Board's analysis is to determine whether the appeal is moot.

[21] The Appellant's application for a development permit was premised on the fact that it was a party to an agreement to acquire the Church property from RCEC. The Appellant had the consent of RCEC to make the application.

[22] The Development Officer's refusal to issue the development permit was the basis for the appeal before the Board.

[23] The Appellant has not acquired the property and the agreement has been terminated. The Appellant is not RCEC's agent. The Appellant would now not be entitled to make use of the development permit. If successful, the remedy the Board is authorized to grant, pursuant to s. 267(1)(d) of the *HRM Charter*, is no longer of any legal or practical benefit to the Appellant.

[24] The "tangible and concrete dispute" underlying the appeal, as that term is defined in *Borowski*, no longer exists. The appeal is therefore moot.

[25] As outlined by Sopinka, J., the Board must now consider whether circumstances exist which warrant the exercise of its discretion to continue with the process and eventually render a decision on the merits of the appeal.

[26] The first broad principle *Borowski* directs the Board to consider is whether there continues to be an adversarial context between the parties. The rationale for seeking an adversarial context is that it provides some assurance that the issues will be fully argued.

[27] An ongoing adversarial context is usually found where there are potential collateral consequences on a party's rights or legal position flowing from a decision in the moot proceeding. Related litigation might provide such an adversarial context, provided there was a sufficient nexus between the appellate decision and such litigation.

[28] In this case, there is no litigation involving the parties to this proceeding. While the Appellant suggests litigation may be forthcoming, the nature of the potential litigation is ill-defined. The Board cannot assess whether a determination of the merits of this appeal would have any potential impact on such contemplated litigation.

[29] In any event, the Appellant's argument on this first broad principle is not directly related to collateral consequences. It hinges on the stage in the proceeding at which the appeal became moot. The Board is reminded by the Appellant that, in *Borowski*, the Supreme Court of Canada had "little or no concern" about the adversarial context, because the case had been fully argued, based on a full evidentiary record. The Appellant argues the same rationale should apply in this case.

[30] In *Borowski*, the mootness issue and the merits of the appeal were argued at the same time, and before the Court rendered a decision on either issue. While in this case the Board has the benefit of a full evidentiary record, the case has not been fully argued. As pointed out by Park to Park and SMU, there is still considerable cost and effort to be expended on their part before the matter can be considered by the Board. The Board therefore does not have the same assurance of a full argument by all parties, given the stated concerns about the cost involved in providing a response to the Appellant's extensive brief.

[31] A consideration of this first rationale does not support the exercise of the Board's discretion to depart from the usual practice of not hearing moot appeals.

[32] The second broad rationale discussed in *Borowski* relates to judicial economy. The Board must determine whether special circumstances exist which justify the application of further resources to this appeal.

[33] *Borowski* discusses three special circumstances which militate in favour of departing from the usual practice of not proceeding with moot appeals:

(i) If the decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the appeal;
(ii) If it involves a case which is of a recurring nature, but brief duration, so as to evade judicial review;
(iii) If the case raises an issue of public importance of which a resolution is in the public interest.

[34] The Appellant submits in order to reach a decision the Board will have to determine the following:

> (i) Who is entitled to exercise the *HRM Charter*-delegated statutory authority of a development officer?
> (ii) When and how can that authority be removed/reassigned?
> (iii) What is the extent of a development officer's discretion in performing an executory function when reviewing as-of-right development permit applications?
> (iv) Can a non-university landowner develop U-1 and U-2 zoned lands for university uses?
> (v) Can a development officer impose a contractual requirement for an agreement with a third party to satisfy the requirement of a land use bylaw?
>
> [Ashcroft Submission, December 14, 2016, p. 4]

[35] The Appellant takes the position that a Board decision would have practical merit by providing certainty to the Appellant, SMU and the greater development community in future applications, with respect to "the exercise of authority within the Planning Department when applications for as-of-right developments are being considered by a development officer."

[36] The Board notes its jurisdiction in this appeal relates to whether the Development Officer's decision was correct. It does not necessarily follow that the Board would have to determine who is entitled to exercise a development officer's statutory authority, or how this authority can be removed or reassigned. These types of issues are not normally the focus of the Board's appellate review in planning matters.

[37] Indeed, it might be argued the Board has no jurisdiction at all to decide such matters. For the purposes of this Decision, the Board will merely assume, without finding, that it does.

[38] The Board would have to make determinations on the extent of a development officer's discretion, the development rights of a non-university landowner with respect to U-1 and U-2 zoned lands, and the authority to impose third party contractual requirements.

[39] There is no evidence Ashcroft currently owns lands in HRM, and no evidence of any corresponding development rights, to which such determinations would apply. Thus, the impact of a Board decision in relation to Ashcroft is uncertain.

[40] As submitted by HRM, there is no evidence concerning SMU's future plans for the Church property. The Board agrees with SMU's position that in these circumstances, the impact of a Board decision would be speculative. As well, SMU does not seek clarity from the Board.

[41] Further, the "greater development community" is not a party before the Board and need not be considered under the first branch of the "special circumstances" test.

[42] In the end, the Appellant's submissions relate more to the public importance of a Board decision in this matter on future applications, as opposed to practical effects on the current rights of the parties. The Board finds these types of considerations are best addressed under the third branch of the "special circumstances" test.

[43] It is clear the case before the Board is not "of a recurring nature, but of brief duration", such that it would often evade review, like an interlocutory injunction, or a writ

of *habeus corpus* in a detention setting, which are discussed in the case law. The Board finds this aspect of the test for special circumstances is not applicable in this matter.

[44] This case raises some novel issues. As submitted by Park to Park, and as held in *Borowski,* the potential that similar circumstances may arise in future has not been found to be, in and of itself, a special circumstance. Again, these types of considerations are best addressed under the third branch of the test.

[45] The third special circumstance addressed in *Borowski* is that a moot appeal may still justify the continued expenditure of resources if it is of sufficient public importance such that a resolution of the issue is in the public interest.

[46] The Board has considered the Appellant's submissions concerning the precedential value of a Board decision, and the clarity it arguably provides to the parties, the "greater development community" and HRM planning staff, in the context of what the Supreme Court of Canada described as an "ill-defined basis for justifying the deployment of judicial resources."

[47] The Board does not consider this case raises issues of sufficient public importance, as framed in *Borowski*, to rise to the level of a special circumstance which would support proceeding further in this matter.

[48] While there are other U-1 and U-2 zoned properties in HRM, this is still a relatively limited number of properties. The number of properties with the U-1 and U-2 zone designation, which are not owned by universities, is even more limited.

[49] There were also interpretation issues raised in the expert evidence relating to the South End Secondary Planning Strategy, with specific reference to the Saint Mary's University campus, which might not be applicable in other planning areas.

[50] The Board further notes that decisions relating to development permits are determined based on the specific application before a development officer. Different applications may give rise to different considerations. While the issues raised by the Appellant may occur again and may have to be addressed in the future, it appears unlikely this type of dispute "will have always disappeared" before the Board can make a determination. In such circumstances, *Borowski* indicates it is preferable to wait until a genuine live controversy is before the Board, in which the matter can be fully argued.

[51] Given the foregoing, the social cost in awaiting a live controversy prior to coming to any determination on the issues raised, in the Board's view, is not of significant magnitude.

[52] The Board finds this case does not address a matter which has sufficient general application to be of such public importance as to override the usual practice not to determine moot appeals.

[53] The third underlying rationale underpinning the mootness doctrine is the need for a court or tribunal to demonstrate a measure of awareness of its proper law-making function.

[54] The Board is a statutory tribunal. Its role in planning appeals is specifically circumscribed by the *HRM Charter.* The Board has no inherent jurisdiction. It does not issue declaratory judgments in planning matters. The principle of *stare decisis* is not applicable to Board decisions. As well, the Board's legal conclusions are not binding on a court.

[55] In discussing the third rationale, *Borowski* warns that "… the Court should be sensitive to the extent that it may be departing from its traditional role." This warning is particularly applicable to statutory tribunals.

[56] Even absent the strict application of *stare decisis*, Board decisions can provide future guidance for those who fall under its jurisdiction. However, determining a moot issue for the purpose of providing such future guidance, while not a declaratory judgment in the technical sense, would be departing from the Board's usual restricted appellate role in planning matters. The Board has not been provided with a compelling reason to do so.

[57] The Appellant submits the criteria outlined in *Borowski* in the exercise of the Board's discretion are not closed or inflexible. The Board agrees.

[58] Ashcroft says the equities of this case "cry out" for a decision. The Appellant points to its efforts to obtain a prompt decision from the Development Officer and what it describes as "the wrongful refusal of the development permit by HRM's Director of Planning in his newly and singularly assumed role of the development officer, with knowledge of the foreseeable outcome of that refusal."

[59] The Appellant goes on to submit a favourable Board decision "may validate or undermine any civil action and would undoubtedly affect the conduct of the immediate parties going forward in other such applications."

[60] While the Board has no jurisdiction to provide equitable remedies in planning matters, it can take account of equitable principles when considering the exercise of its discretion. This said, this discretion must be exercised judicially.

[61] The Board agrees with HRM's submission that it is not its role to validate or undermine any contemplated civil action. In any event, as previously discussed, without knowing the specifics of any intended civil action, the impact of the Board's decision is speculative.

[62] The Board has already addressed issues related to making a decision to provide guidance for future applications in its discussion above. The same rationale applies to the Appellant's argument related to the impact of a Board decision on future conduct.

[63] The Board is not persuaded the additional criteria advanced by the Appellant justify it exercising its discretion to continue with this appeal.

V CONCLUSION

[64] Park to Park, supported by HRM and SMU, has made a motion to have Ashcroft's appeal dismissed on the grounds it has become moot.

[65] The Board finds that as the development permit, which is the subject matter of this proceeding, is no longer of any legal or practical benefit to Ashcroft, the appeal is moot.

[66] The Board finds that, in accordance with the principles outlined by the Supreme Court of Canada in *Borowski*, the lack of any adversarial context between the parties, principles of judicial economy, and the proper role of the Board, do not support the exercise of its discretion to continue this appeal.

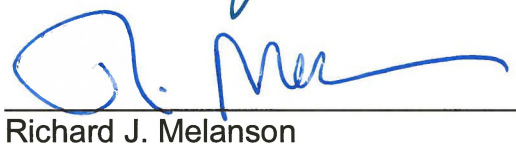
[67] Accordingly, the Board grants the Preliminary motion to dismiss the appeal as being moot.

[68] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 16th day of January, 2017.

Roland A. Deveau

Roberta J. Clarke



Richard J. Melanson